KRIEG DEVAULT

Insights

Transferring Florida Real Estate - Tread with Caution

October 4, 2022

By: Rodney S. Retzner

Hurricane Ian focused our thoughts on Florida over the last week. Many of us have family, friends and clients in Florida, living full-time, "snow birding," or just visiting. As we think about those individuals we are reminded of the various homes, condominiums and other real estate interests they own, rent or may be thinking about renting or buying in Florida. The first reaction of most estate planning attorneys when confronted with a client owning real estate outside of Indiana is to transfer that property into a trust, LLC or other method to avoid the need for probate administration in Indiana and an ancillary probate administration in Florida. Easy in concept, however, Florida's property tax laws may yield a result that could be much worse than ancillary administration.

Residents of Florida are entitled to significant "homestead" protections (see below), but even non-residents of Florida are entitled to some property tax cap protection. Non-homestead property in Florida enjoys a 10% cap on the annual increase in assessed value under the "Save our Homes" legislation which was put in place in 2009. Non-homestead property includes all properties that do not have a homestead exemption, such as second homes, rentals, vacation homes, etc. The cap for non-homestead property ensures that the assessed value of the property will not increase more than 10% from the previous years' assessed value. The cap is applied automatically to the property so there is no application and remains in place so long as there is no "change in ownership or control." Any change of ownership or control typically triggers a reassessment of the property to fair market value as of January 1st of the following year. If that reassessment is triggered, the assessed value of the property jumps to the then full market value, with the cap starting over at the new value (and, of course) the property tax applied to that new value.

According to a report by the Federal Housing Finance Agency in May 2020, Florida homes increase at an average annual rate of 7.1%. That being the average across a very large state, it is easy to assume that a considerable number of homes, especially those in sought-after markets, increase in value at a much higher rate (likely more than the 10% cap). At a 10% annual increase, a client bought a home for $500,000 in 2009 has a home worth about $1.7 million in 2022. Move that average, annual increase just 1%, to 11%, and over that same time and the value would be $1.95 million in 2022; a difference in value of an additional $250,000. The effect of that 10% cap cannot be overstated and the value of keeping property taxes calculated on that client's home at the lower value may significantly outweigh avoiding ancillary probate.

The key is the definition of "change of ownership" or "change of control" as a change deemed to be one of those can subject the property to reassessment to fair market value on the following January 1st. Florida law defines the "change of ownership" as any sale, foreclosure or transfer of legal title or beneficial title in equity to any person. That definition is obviously broad enough to pick up the transfer from the client to the client's revocable trust; even though there is a very good argument that no actual change of ownership or control in that circumstance occurred. As each county's property appraiser is different and applies the law differently, it is best to contact that appraiser to determine if the proposed transfer will trigger the reassessment.

Some argue that if a transfer to a revocable trust or LLC causes reassessment, another option for Florida property would be the "lady bird deed" or "enhanced life estate deed." The lady bird deed transfers property upon the death of the primary owner and is akin to a life estate, however, Florida has no law concerning "life estates" or "transfer on death." Nonetheless, a lady bird deed can be used in Florida and keeps the grantor as the current owner and in control of the property during lifetime yet allows for naming a remainder beneficiary to inherit the property after the owner's death. Unlike a life estate, a lady bird deed provides the property owner full control over the property during the owner's lifetime (allowing the owner to revoke the deed, sell or mortgage the property, etc. without the beneficiary's consent). Unfortunately, transfer by a lady bird deed can also be considered a "change of ownership or control" and trigger reassessment. The same advice, therefore, is to confirm the possibility of reassessment with the county appraiser and do the math to advise the client on the potential tax increase if the reassessment occurs.

A final option, of course, is to have the client change residency to Florida and take advantage of the homestead exemption and related tax exemptions on the real estate. Becoming a resident of Florida is the topic for a whole, separate article but Florida homestead protection on resident's property is unique and extremely valuable. For example, the Florida law protects the owner of a homestead from the claims of creditors regardless of the value of the homestead property (see OJ Simpson's civil trial). Additionally, Florida residents enjoy a 3% cap on the annual increase in the assessed value of homestead property (as compared to the 10% cap on non-homestead property). Depending on how much time the client spends in Florida it may be advisable for the client to simply change residency to Florida and claim the full protection of the Florida homestead law rather than the limited protection for nonresidents (not to mention the fact that Florida has no state level income tax for its residents).

In summary, tread carefully when transferring Florida property in attempt to avoid probate. The cure could be worse than the disease. The advice is to first assess the potential change in property tax if the property value is reassessed after transfer. Determine if the risk is worth the reward. If the difference in property tax is minimal, then pick the method by which probate avoidance makes the most sense and proceed with the transfer. If a large change in property tax is possible, however, tread with caution and at least get an opinion from the county appraiser as to how he or she will treat the transfer.

Please direct questions to **Rodney S. Retzner**, Partner and Chair of Krieg DeVault's Estate Planning Practice. Mr. Retzner is licensed to practice in Indiana and Florida.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult

with counsel concerning your situation and specific legal questions you may have.